

April 15, 2008

United States District Court
Northern District of California
Attn: Teresa De Martini, Deputy Clerk for
Judge Samuel Conti
450 Golden Gate Ave.
San Francisco, CA 94102

United States of America v. Regal Stone Ltd., et al.
USDC Case No. C-07-06045-SC

Per Local Rule 16-10(d), counsel jointly submits this cover letter and attached February 22, 2008 Case Management Statement for the April 25, 2008 Case Management Conference. Except for the developments relating to the criminal case involving Defendant John Cota, the information provided in the previously filed and attached February 22, 2008 statement submitted continues to be accurate and true. As described below, the parties suggest the Case Management Conference scheduled for April 25, 2008 be moved to May 9, 2008 to coincide with the hearing date set for Defendants Regal Stone, Ltd.'s and Fleet Management, Ltd.'s recently filed motion.

The parties jointly advise the Court of additional motions filed after the February 22, 2008 Case Management Conference. On March 21, 2008, Defendants Regal Stone, Ltd. and Fleet Management, Ltd. filed a Motion to Dismiss or in the alternative a Motion to Stay. The hearing date was set for April 25, 2008. On March 26, 2008, Plaintiff filed an Amended Complaint. On April 4, 2008, Defendants Regal Stone, Ltd. and Fleet Management, Ltd. filed a revised Motion to Dismiss or in the alternative a Motion to Stay. The Court scheduled a hearing date of May 9, 2008 for the revised Motion to Dismiss.

On March 17, 2008 the United States commenced criminal proceedings against John Cota by filing information charging him with violation of two misdemeanors. John Cota is a defendant in two of the proceedings before this court; *United States of America v. Regal Stone Ltd., et al.*, *Shogren Living Trust et al v. Regal Stone, Ltd. et al* (C-07-06045 SC).

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United States of America v. Regal Stone Ltd., et al.

USDC Case No. C-07-06045-SC

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff,

vs.

M/V COSCO BUSAN, LR/IMO Ship No.
9231743, her engines, apparel, electronics, tackle,
boats, appurtenances, etc., in rem, THE
SHIPOWNERS' INSURANCE & GUARANTY
COMPANY LTD., REGAL STONE LIMITED,
FLEET MANAGEMENT LTD., AND JOHN
COTA, in personam,

Defendants.

C 07-6045(SC)

IN ADMIRALTY

PROPOSED CASE MANAGEMENT
PLAN AND PROPOSED ORDER

DATE: February 22, 2008
TIME: 10:00 a.m.
COURT: Hon. Samuel Conti
Courtroom 1

CASE MANAGEMENT PLAN AND PROPOSED ORDER – C07-6045 SC

MEETING

Pursuant to the Court's Order of December 13, 2007, the following parties and their representatives conferred on January 31, 2007:

A. Appearing on behalf of Plaintiff United States:

R. Michael Underhill, United States Department of Justice, Torts Branch, Civil Division;

Bradley R. O'Brien, United States Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section.

B. Appearing on behalf of Defendants: M/V COSCO BUSAN ("COSCO BUSAN"); Regal Stone Limited ("Regal Stone"), the latter presently appearing solely pursuant to Supplemental Admiralty Rule E(8) of the Fed.R.Civ.P. as claimant to COSCO BUSAN, and Fleet Management Ltd. ("Fleet Management"):

John D. Giffin and Nicole Bussi, Keesal Young & Logan.

C. Appearing on behalf of Defendant John Cota ("Cota"):

Walter G. Coppenrath, Jr., Phillip S. Dalton and George M. Jones, Coppenrath & Associates.

D. Appearing on behalf of Defendant Shipowners' Insurance & Guaranty Company Ltd. ("SIGCO"):

Richard L. Jarashow and Sidney Kanazawa, McGuire Woods.

I. JURISDICTION AND SERVICE

Jurisdiction: The United States brought this suit and has alleged jurisdiction pursuant to the following statutes:

a. 28 U.S.C. § 1345;

b. The National Marine Sanctuaries Act ("NMSA"), 16 U.S.C. §§ 1431, *et seq.*, including sections 1437 and 1443;

c. The Park System Resource Protection Act ("PSRPA"), 16 U.S.C. § 19jj, *et*

1 *seq.*, including section 19jj-2; and

2 **d.** The Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. §§ 2701, *et seq.*,
3 including section 2717.

4 **e.** As set forth below, the United States may amend its complaint to assert a
5 claim for a judicially assessed civil penalty pursuant to the Clean Water Act,
6 33 U.S.C. § 1321(b)(7), as amended by OPA.

7 **Service:** The United States has served all parties other than defendant Regal Stone,
8 which purports to be an entity located in Hong Kong. The United States has attempted to serve
9 Regal Stone under provisions of the Hague Service Convention, but to date no return of the
10 summons and complaint has been received.

11 **Counterclaims:**

12 No counterclaims have been asserted.

13 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:** As
14 described more fully below, Defendants contest subject matter jurisdiction and will move to
15 dismiss on that basis.

16 **II. FACTS**

17 The United States’ complaint alleges that on November 7, 2007, the COSCO BUSAN
18 allided with the base and/or fendering system of the “Delta Tower,” one of the support towers of
19 the western span of the San Francisco-Oakland Bay Bridge (the “Incident”). The allision with
20 the Bay Bridge resulted in a rupture of the COSCO BUSAN’s fuel tanks, thereby allowing fuel
21 oil to be discharged into navigable waters of the United States. The United States contends that
22 the discharge impacted adjoining shorelines of San Francisco Bay, the Pacific Ocean, the Gulf of
23 the Farallones National Marine Sanctuary and the Monterey Bay National Marine Sanctuary, and
24 units of the National Park System, including, but not limited to, the Golden Gate National
25 Recreation Area, Point Reyes National Seashore, San Francisco Maritime National Historic Park,
26 and Rosie the Riveter/World War II Home Front National Historic Park.

1 The United States' complaint alleges that at the time of the Incident Regal Stone was the
2 owner of the COSCO BUSAN; that Fleet Management was the operator of the vessel; that Cota
3 was the pilot of COSCO BUSAN. The United States' complaint further has alleged that
4 defendant SIGCO provided evidence of financial responsibility and certain guarantees pertaining
5 to the Vessel, said financial guarantees made pursuant to OPA, 33 U.S.C. § 2716, and regulations
6 promulgated pursuant to OPA.

7 In signing this Case Management Plan, none of the defendants herein admit, nor shall
8 they be deemed to have admitted, any allegation of the United States' complaint and, conversely,
9 the defendants each reserve any and all claims, rights, denials, and defenses as may be set out by
10 way or answer, responsive pleading, and/or motion.

11 **III. LEGAL ISSUES**

12 **United States' Position:** The defendants' liability, without limitation, declaratory relief,
13 potential forfeiture, interest, and disbursements sustained by the United States under the various
14 statutes and causes of action pled in the United States's complaint, as well as pursuant to any
15 amended complaint asserting civil penalties, including judicially assessed civil penalties under
16 the Clean Water Act, 33 U.S.C. § 1321(b)(7).

17 The United States is submitting this proposed Case Management Order solely as it relates
18 to the instant civil judicial action and solely as a result of the Court's Orders concerning the Case
19 Management Plan and Case Management Conference. The United States' undersigned attorneys
20 in this civil action are not aware of any indictment or criminal case that has been filed against any
21 of the defendants herein. The United States therefore takes no position at this time, and has no
22 comment upon, allegations or statements made by certain defendants in this proposed Case
23 Management Order relating to criminal proceedings.

24 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:** This
25 action fails to present a justiciable case in controversy. The position of the Defendants COSCO
26 BUSAN, Regal Stone Ltd. and Fleet Management Ltd. is that the United States' claims are not
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1 ripe, that this Court lacks subject matter jurisdiction over the claims asserted by the United States
2 and that the United States is required by applicable law to submit its claims for removal costs and
3 damages first to the designated Responsible Party (Regal Stone Ltd.) before it may initiate a
4 lawsuit.

5 **Defendant John Cota's Position:** Cota will join in Co-Defendants' Motion to Dismiss
6 or Stay on the grounds that the United States' claim is not ripe and of a lack of jurisdiction and
7 failure of the United States to comply with applicable administrative procedures. Cota will
8 further move to the dismiss or stay this action in that the United States Department of Justice
9 contemplates a criminal proceeding against him and requiring civil discovery of Captain Cota
10 would violate his Fifth Amendment rights; additionally, the United States has not exhausted its
11 administrative remedies.

12 **IV. MOTIONS**

13 No motions have been filed.

14 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:** A
15 Motion to Dismiss the United States' Complaint will be filed by Defendants M/V COSCO
16 BUSAN, Regal Stone Ltd. and Fleet Management Ltd. The basis of the Motion will be, as stated
17 above, *i.e.*, the United States' claim is not ripe, lack of subject matter jurisdiction and failure of
18 the United States to comply with applicable administrative procedures. In the alternative, and for
19 the same reasons above along with the fact that the United States is already pursuing a
20 contemporaneous criminal proceeding, the Defendants will ask the Court to stay the suit.

21 **Defendant John Cota's Position:** Cota will join in Co-Defendants' Motion to Dismiss
22 or Stay on the grounds that the United States' claim is not ripe and of a lack of jurisdiction and
23 failure of the United States to comply with applicable administrative procedures. Cota will
24 further move to the dismiss or stay this action in that the United States Department of Justice
25 contemplates a criminal proceeding against him and requiring civil discovery of Captain Cota
26 would violate his Fifth Amendment rights and the United States has not exhausted its
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1 administrative remedies.

2 **Defendant SIGCO's Position:**

3 Unless agreement can be reached with the United States pursuant to pending discussions
4 regarding voluntary dismissal of SIGCO, following discovery or an admission by the United
5 States confirming that the OPA limits applicable to SIGCO's Guaranty at the time of the incident
6 have been expended for OPA removal costs and damages, SIGCO intends to move by way of
7 summary judgment for dismissal of the case as to SIGCO.

8 **V. AMENDMENT OF PLEADINGS**

9 **United States' Position:**

10 The United States asserts that it may amend its complaint. If filed, the amended
11 complaint could include:

12 a. A claim for a judicially assessed civil penalty pursuant to the Clean Water
13 Act, 33 U.S.C. § 1321(b)(7), as amended by OPA;

14 b. Removal of SIGCO as a defendant. The United States and SIGCO are
15 discussing the possibility of dismissing said defendant without prejudice.

16 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

17 Defendants M/V COSCO BUSAN, Regal Stone Ltd. and Fleet Management Ltd. have no
18 present intention to amend their pleadings. Defendants will contest the assertion by the
19 Government in paragraph c. above, on the basis that it is a pretext for the United States to
20 conduct early discovery on strict liability issues to gain an unfair advantage in its pending
21 criminal investigation and or other proceedings.

22 **VI. EVIDENCE PRESERVATION**

23 **United States' Position:** The obligation to preserve evidence relevant to the issues
24 reasonably relevant in this action shall be as set forth in the United States' proposed Case
25 Management Plan.

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1 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

2 Defendants Regal Stone Ltd. and Fleet Management Ltd., and their counsel, are taking
3 appropriate steps to preserve relevant evidence, and assert that the Federal Rules of Civil
4 Procedure, specifically 26(f) and this District Court's Standing Order effective since March 1,
5 2007 are sufficiently adequate and should be followed over the modified approach suggested by
6 the Government.

7 **Defendant John Cota's Position:** Defendant Cota has taken and will continue to take
8 appropriate steps to preserve relevant evidence.

9 **VII. LITIGATION AND INITIAL DISCLOSURES**

10 **United States' Position:** The United States believes this is a complex case, but does not
11 believe that the procedures of the Manual for Complex Litigation should be utilized. The United
12 States believes that, in the interest of efficiency and judicial economy, that litigation should be
13 phased as follows:

14 **Phase I:** Liability, damages (other than natural resource damages reserved for Phase
15 III), declaratory relief (Fourth Cause of Action, 33 U.S.C. § 2717(f)(2)),
16 and civil penalty issues. Phase I will extend for a period not to exceed 15
17 months

18 **Phase II:** Mediation relating to the natural resource damage assessment, natural
19 resource injuries, and natural resource damages; and other unresolved
20 Phase I issues. Phase II will extend for a period not to exceed three
21 months.

22 **Phase III:** If Phase II does not lead to settlement, issues relating to the natural
23 resource damage assessment, natural resource injuries, and natural
24 resource damages. Phase III will extend for a period not to exceed 15
25 months.

26 All fact and expert discovery, dispositive motions, and trials shall be conducted during
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1 the appropriate phase. No schedule or discovery limits shall be entered at this time with respect
2 to Phase III; these requirements shall be determined in a case management order to be entered
3 upon commencement of Phase III.

4 Consistent with the this phased approach, and pursuant to Fed. R. Civ. P. 26(a)(1), the
5 parties will exchange initial Phase I disclosures (including Rule 26 requirements) on or before
6 May 1, 2008, and will exchange initial Phase III disclosures (including Rule 26 requirements)
7 within 30 days of the initiation of Phase III. The parties will reach agreement on the selection of
8 the mediator for Phase II and are expected to complete the mediation process within the specified
9 three month period without the aide of the Court.

10 To the extent it is otherwise consistent with this Case Management Plan, the parties will
11 attempt to coordinate discovery with the related cases described in Section X of this Case
12 Management Plan, and litigation that is initiated in other jurisdictions.

13 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

14 Defendants M/V COSCO BUSAN, Regal Stone Ltd. and Fleet Management Ltd. believe
15 that the United States' lawsuit should be dismissed in its entirety, or in the alternative, stayed
16 pending the United States' proper submission of its claims in accordance with applicable law and
17 its own established administrative procedures.

18 Defendants M/V COSCO BUSAN, Regal Stone Ltd. and Fleet Management Ltd. further
19 assert that the United States' suggested approach of phased litigation is unwarranted,
20 unnecessarily complex and actually illustrates the fact that there is no case in controversy because
21 its case is not ripe and that the United States is simply seeking to conduct discovery to gain an
22 unfair advantage on issues currently being investigated by United States in its criminal
23 investigation.

24 **Defendant John Cota's Position:** Defendant Cota believes that the United States'
25 lawsuit should be dismissed in its entirety or, in the alternative, stayed pending the United States'
26 proper submission of claims in accordance with applicable law. Cota further contends that the
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1 United States' lawsuit must be dismissed or stayed pending the resolution of a parallel criminal
2 proceeding contemplated by the United States against defendant Cota.

3 **VIII. DISCOVERY AND FACTS**

4 **United States' Position:**

5 No discovery has been taken to date. Certain crew of the COSCO BUSAN (*i.e.*,
6 crewmembers aboard the vessel on the date of the bridge allision) are believed by the
7 undersigned Government counsel still to be in the United States. These percipient
8 witnesses/crew are not United States citizens or resident aliens. Thus, to the extent they already
9 are or later may be outside the jurisdiction of the United States and the Court, they will be
10 beyond the *subpoena* power of United States courts, state courts, and federal or state
11 administrative agencies. The United States has served notices of depositions *de bene esse* of the
12 said crewmembers in order to preserve their testimony for trial and/or motion practice. The
13 notices did not include specific dates and it is the intention of the Government to work with all
14 counsel to seek mutually convenient times and dates, but, in any event, to conduct the
15 depositions before the crew leave the United States and the Court's jurisdiction and *subpoena*
16 power. Should one or more defendants move for a stay of this action, and should such a motion
17 be granted, the United States will seeks the Court's permission and assistance in securing the said
18 depositions as an exception to the stay.

19 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:** M/V

20 COSCO BUSAN, Regal Stone Ltd. and Fleet Management Ltd. believe that no discovery should
21 be taken, as the United States' claim is premature and further on the grounds that applicable law
22 makes the Defendant Regal Stone strictly liable for the very damages arising from the oil spill
23 alleged in the United States' Complaint. There is no case in controversy, and again the United
24 States' attempt to engage in discovery on an issue where Defendant Regal Stone is strictly liable
25 is simply unwarranted, a waste of judicial resources and a pretext to gain an unfair advantage in
26 other proceedings being pursued by the United States.

1 The United States is well aware that six crew members from COSCO BUSAN are in the
2 United States; in fact, it issued and served material witnesses warrants on each of these crew
3 members and they are currently being held in the United States pursuant to those warrants. The
4 United States knows that each of those crew members are individually represented by separate
5 counsel.

6 **Defendant John Cota's Position:**

7 Defendant Cota contends that, as currently alleged, all causes of action provide for strict
8 liability. Vessel Interests are currently funding all approved claims, response costs and natural
9 resource damages as they are determined pursuant to applicable statutes and regulations. There is
10 consequently no need for discovery or a trial at this time and this case should be stayed or
11 dismissed pending the ultimate outcome of all administrative processes related to damages and
12 payments therefore. Furthermore, in light criminal proceedings contemplated by the Department
13 of Justice against Captain Cota, it would be unfair and prejudicial to require him to participate in
14 civil discovery in light of his Fifth Amendment rights.

15 Accordingly, Cota contends there is presently no need for a Discovery Schedule or
16 agreement as to discovery procedures unless and until the Court rules on the upcoming motions
17 to dismiss or stay this action.

18 Furthermore, Defendant Cota strenuously disagrees with and objects to the United States'
19 position that it has no obligation to preserve or produce documentary evidence, as articulated in
20 Section VIII.B.a. Such a position is, at the very least, violative of due process and fundamental
21 fairness.

22 **B(m)(1)(b)** The exchange of electronic documents shall be in PDF format, not TIFF as
23 proposed by the USA.

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A. Discovery Plan:

United States' Position:

The United States proposes the following discovery and trial schedule for Phase I:

Close of Fact Discovery	_____
Expert Reports	
Plaintiff:	_____
Defendants:	_____
Plaintiff's Rebuttal	_____
Deadline to Amend Pleadings	_____
Close of Expert Discovery	_____
Last Day to File Dispositive Motions	_____
Meeting of Counsel Prior to	
Final Pretrial Conference	_____
Joint Exhibit List	_____
Memorandum of Contentions of	
Fact and Law	_____
Last Day for Filing Motions in Limine	_____
Final Pretrial Conference Order	_____
Pretrial Conference	_____
Disclosure of Demonstratives	_____
Trial Brief	_____
Trial on Liability	Dependent upon the Court's
	schedule, and barring potential stay
	of this action (as one or more
	defendants may propose), the United
	States proposes May or June of 2009,

with all pretrial dates to be set by the
Court in accordance with the trial
date ordered by the Court.

Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:

Defendants object to a discovery plan proposed by the government based on a phased
litigation. As stated above, such an approach is unwarranted and designed simply to give the
United States an unfair advantage.

B. General Matters:

United States' Position:

a. Documents: The United States shall have no obligation to preserve,
search for or produce, or otherwise identify as privileged, documents in the files of the
United States Department of Justice or within the files of legal counsel for the National
Oceanic and Atmospheric Administration, the Department of the Interior, the United
States Coast Guard, or any other federal agency that brings a claim in this action.
Defendants shall have no obligation to preserve, produce or otherwise identify as
privileged, documents in the files of its outside litigation counsel in this case or within the
files of in-house legal counsel. This limitation has no effect on the parties' obligations to
search for, produce or otherwise identify as privileged, copies of all documents that are
otherwise in a party's possession.

b. Non-waiver: By exchanging documents and communications with each
other, the parties do not waive any privilege, immunity, or other basis for confidentiality
that otherwise applies to these documents and communications.

c. Unnecessary Assertions of Privilege: It is unnecessary to identify any
documents prepared by or at the direction of counsel after November 7, 2007, or assert
any privilege over such documents. It is unnecessary to identify any electronic mail sent
among the attorneys jointly representing a client in the matter at issue, or between an

1 attorney and his or her client in the matter at issue, without regard to the date on which
2 such electronic communication was sent. This provision shall also apply to electronic
3 mail sent among attorneys of various governmental agencies that share a common interest
4 in pursuit of claims, penalties/fines, damages, and other regulatory and/or injunctive relief
5 related to the Incident.

6 **d. Electronic Service:** All discovery requests served by a party shall include
7 service by electronic mail in a word processing format, such as Word and/or Word
8 Perfect.

9 **e. Sequential Numbering:** For purposes of clarity and efficiency, to the
10 extent possible, deposition exhibits (including fact and expert deposition exhibits) will be
11 sequentially numbered during each deposition and throughout the course of depositions.
12 For example, the first exhibit of the first deposition will be numbered one, the second
13 exhibit will be numbered two and so forth. If the first deposition ends with exhibit five,
14 then the second deposition will begin with exhibit six. If a previously numbered exhibit
15 is used in a subsequent deposition, the parties will use the number initially assigned to it.

16 **f. Interrogatories:** Each party is limited to 20 interrogatories for Phase I,
17 including, pursuant to Fed. R. Civ. P. 33(a), all discrete subparts.

18 **g. Requests for Admission:** The parties anticipate serving requests for
19 admissions, pursuant to Fed. R. Civ. P.36.

20 **h. Requests for Productions:** The parties anticipate serving requests for
21 production, pursuant to Fed. R. Civ. P. 34.

22 **i. Fact Depositions:** There will be a maximum of 20 fact depositions taken
23 by each party for Phase I without leave of court. The parties will make good faith efforts
24 to confer prior to scheduling depositions and to adhere to any schedules agreed upon by
25 counsel. The parties will adhere to the following procedures.

26 **1.** Notices of depositions may be served on officers and employees of
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1 the parties, without resort to subpoenas or further process;

2 2. The time between service of deposition notice and the date set for
3 the deposition by that notice shall be no less than 20 business days unless
4 shortened by agreement of the parties or order of the Court;

5 3. Each deposition of a fact witness, not including 30(b)(6)
6 deponents, shall be limited to one day of 7 hours, excluding breaks, unless
7 extended by agreement of the parties or order of the Court. Each
8 deposition taken pursuant to 30(b)(6) shall be limited to two days of 7
9 hours each, excluding breaks, unless extended by agreement of the parties
10 or order of the Court.

11 j. **Expert Discovery:** Notwithstanding any provision in the Fed. R. Civ. P.
12 to the contrary, the following terms apply to both the productions of documents under Rule
13 26(a)(2)(B), Rule 34, and Rule 45, and to the timing and scope of expert deposition
14 testimony.

15 1. At the time of submission of expert reports, the parties will identify
16 “the data or other information considered by the witness in forming [his or
17 her] opinions,” in accordance with Fed. R. Civ. P. 26(a)(2). For the
18 purpose of this Case Management Plan, except as noted below,
19 “considered documents” shall be those documents (other than those
20 determined not to be relevant after cursory review) that have been
21 furnished to the expert to be used in forming opinions, have been received
22 and read or reviewed, or taken into account by the expert, regardless of
23 whether the expert actually relies upon the document, in forming his or her
24 opinion. Such “data or other information” may be subject to questioning
25 during expert depositions. The party submitting expert reports will
26 provide all copies of all “considered” documents to the other party within
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1 7 days of submitting the corresponding expert report(s). Where such “data
2 or other information” was produced by either party in this litigation,
3 identification by Bates number will be sufficient. The party submitting
4 expert reports shall identify information that is publicly available, but is
5 required to produce such documents only if it is more burdensome for the
6 party receiving the report to obtain them than it would be for the party
7 producing the report, and upon specific request.

8 2. Notwithstanding paragraph 1, all drafts and pre-final versions of
9 the expert’s report shall be outside the scope of expert discovery. “Drafts
10 and pre-final versions” shall be interpreted to encompass only the
11 following:

12 a. Draft or preliminary spreadsheets, tables, or other
13 quantitative analyses, outlines, notes, or other work papers or
14 preliminary drafts of the expert’s report that were created by the
15 expert (or persons employed by or otherwise working for the
16 expert) as part of preparing his/her report. However, if the
17 testifying expert relies upon spreadsheets, tables, or other
18 quantitative analysis created in preparation of his/her report, the
19 final iteration of the document relied upon is subject to discovery,
20 unless all information relied upon is contained in the expert’s final
21 report;

22 b. Drafts and pre-final versions exchanged between the expert
23 (or persons employed by or otherwise working for the expert) and
24 another testifying expert. However, if one testifying expert
25 (“Expert A”) relies on a document authored by another testifying
26 expert (“Expert B”), the version of the document relied on is
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1 subject to discovery from Expert A, notwithstanding its status as a
2 “draft” to the authoring expert, Expert B, unless all information
3 considered by Expert A is contained in Expert B’s final report; and

4 c. Non-substantive communications (including electronic
5 mail) between the expert (or persons employed by or otherwise
6 working for the expert) and the party or any representative thereof
7 (including counsel);

8 3. Additionally, the following two categories of communication are
9 not discoverable:

10 a. The substance of comments (both written and verbal) about
11 drafts and pre-final versions of expert reports by an attorney or
12 other representative of a party are not discoverable;

13 b. Except for the expert’s hourly rate and estimates of the total
14 time spent preparing the expert report, all documents or other
15 information relating to the expert’s contractual arrangement with
16 the party (or any representative thereof) for purposes of preparing
17 the expert report (e.g., billing statement, statements of work, etc.)
18 shall not be discoverable, unless such documents fall into the
19 category described in VI(F)(1) above.

20 4. With regard to the expert depositions:

21 a. There will be no formal numeric limitation on the number
22 of expert depositions;

23 b. Each party will pay for the time that the party’s own expert
24 spends in deposition; and

25 c. The 7 hour, one-day limit imposed by Rule 30(d)(2) shall
26 not apply to expert depositions. Except as otherwise set forth in
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1 this subparagraph, the deposition of an expert shall be limited to 14
2 hours. Without agreement of counsel, no deposition of an expert
3 shall last more than 7 hours in any calendar day excluding breaks.
4 If a party anticipates either before or during a deposition of an
5 expert that an expert's deposition will take longer than 14 hours,
6 the parties shall discuss the need for an extension. If the parties in
7 this case cannot reach an agreement regarding an extension, the
8 party taking the deposition may seek relief from the Court and
9 bears the burden of demonstrating that 14 hours are inadequate.

10 **k. Effect of Inadvertent Production of Documents:** The parties agree that
11 the inadvertent production of documents or metadata shall not, in and of itself, waive any
12 privilege that would otherwise attach to the documents produced. The following
13 procedures shall apply to any such claim of inadvertent production.

14 Promptly from the time the party actually learns of the inadvertent production, the
15 producing party shall give all counsel of record notice of the claimed inadvertent production.
16 The notice shall identify the document, the portions of the document that were inadvertently
17 produced, and the first date the document was produced. If the party that produced a document
18 claims that only a portion of the document was inadvertently produced, the party shall provide
19 the notice of inadvertent production, a new copy of the document with the allegedly privileged
20 portions redacted.

21 A party receiving documents is under a good-faith obligation to promptly alert the
22 producing party if a document appears on its face or in light of facts known to the receiving party
23 to be privileged.

24 Once an inadvertently produced document has been identified, the receiving party must
25 promptly return, sequester, or destroy the specified information and may not use or disclose the
26 information until the claim is resolved. Upon resolution of an inadvertent production claim in
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1 favor of the producing party, the originally produced non-redacted documents and all copies will
2 be returned to the producing party.

3 **l. Joinder of Additional Parties:** The United States is not aware that
4 additional parties or related parties will be joined.

5 **m. Electronic Disclosures:**

6 **1. Criteria for the Production of Electronic Documents.** All
7 documents or information provided by electronic means shall be provided in a
8 reasonably usable form. Specifically, all documents or information shall:

- 9 a. be provided on a CD-ROM or on an external hard drive,
10 USB 2.0, for Windows compatible personal computers;
- 11 b. be provided as 300 dpi single-page TIFF files;
- 12 c. minimally contain a start and end Bates number for each
13 document and its extracted or OCR-processed text;
- 14 d. be uniquely Bates numbered (as part of the actual image
15 file - not as an overlay);
- 16 e. be accompanied by a "cross reference file" which associates
17 each Bates number with its corresponding single-page Tiff image
18 file. The cross reference should also contain the image file path for
19 each Bates numbered page. Cross reference files shall be
20 formatted for Opticon or IPRO software; and
- 21 f. not contain passwords protecting files or media, or if
22 passwords are contained, the passwords shall be provided.

23 **2. Preservation and Production of Electronically Stored Information.**
24 The parties need not preserve the following categories of electronic
25 information for this litigation:

- 26 a. data duplicated in any electronic back-up system for the
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1 purpose of system recovery or information restoration, including
2 but not limited to, system recovery back-up tapes, continuity of
3 operations systems, and data or system mirrors or shadows, if such
4 data are routinely purged, overwritten or otherwise made not
5 reasonably accessible in accordance with an established routine
6 system maintenance policy;

7 b. voicemail messages;

8 c. instant messages that are not ordinarily printed or saved or
9 maintained in a database;

10 d. electronic mail sent to or from a Personal Digital Assistant
11 (e.g., Blackberry handheld) provided that a copy of such mail is
12 routinely saved elsewhere;

13 e. other electronic data stored on a Personal Digital Assistant,
14 such as calendar or contact data or notes, provided that a copy of
15 such information is routinely saved elsewhere;

16 f. logs of calls made from cellular phones;

17 g. deleted computer files, whether fragmented or whole;

18 h. temporary or cache files, including internet history, web
19 browser cache and cookie files, where located;

20 i. server, system or network logs; and

21 j. electronic data temporarily stored by laboratory equipment,
22 monitoring equipment or attached electronic equipment, provided
23 that such data is not ordinarily preserved as part of a laboratory
24 report.

25 3. Similarly, the parties have no general obligation to provide
26 privileges for the category of electronically stored information listed
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above in Section VIII. 2. a - j.

Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:

Defendants believe that the Federal Rules of Civil Procedure, including specifically 26 (a)(2), 26 (f) and this District Court's Standing Order effective since March 1, 2007 are sufficiently adequate and should be followed over the modified discovery approach suggested by the Government.

Defendants alert the Court to the fact that many of the federal agencies which make up the United States have separate counsel that are acting in capacities other than as litigation counsel. Moreover, to the extent that United States has initiated this civil action at this time (which the defendants assert is premature), and at the same time now seeks to carve out its compulsory claim for Natural Resource Damages, the Court should be advised that the State of California is also involved which presents significant Eleventh Amendment issues, particularly for the Defendants. That is, expert analysis and communications could be conducted by the State and then withheld from discovery in this action. In addition the parties, including the United States and the State of California are already actively engaged in an ongoing cooperative assessment process being funded entirely by Regal Stone for determining damage/injury and restoration. The governments' proposal for exempting out its obligations to identify and preserve privileged communications, and documents as otherwise required under FRCP 26 is inconsistent with its efforts in the cooperative process. In addition, the Defendants believe that as a matter of complete fairness, if discovery is conducted that it should simply be conducted in accordance with Rule 26. This approach would also apply to draft and pre-final versions of expert reports FRCP 26 (4) and (5).

IX. CLASS ACTIONS

Not applicable to the present action, C07-6045 SC.

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1 **X. RELATED CASES**

2 Chelsea, LLC et al v. Regal Stone, Ltd. et al., Civil Action No. 07-5800; and

3 Shogren Living Trust, et al v. Regal Stone, Ltd. et al. Civil Action No. 3:07-5926.

4 **XI. RELIEF**

5 **United States' Position:**

6 The United States seeks response costs and damages, without limitations, declaratory
7 relief, potential forfeiture, interest, disbursements sustained by the United States, and reserves the
8 right to assert claims for penalties, as aforesaid.

9 Natural resource damages will be determined through a natural resource damages
10 assessment (NRDA), which is currently being conducted pursuant to procedures contained in 15
11 CFR, Part 990. Pursuant to this process, data is being collected and studies undertaken to
12 determine the extent of injuries to natural resources and will be used to select and "scale"
13 restoration projects that will compensate the public for injuries to resources and their losses or
14 services they provide. The cost of these restoration projects will determine the amount of
15 damages.

16 The NRDA process has to date identified nine categories of injured resources: birds,
17 mammals, fish, human uses, cultural resources, and rocky intertidal, sandy beach, saltmarsh, and
18 eelgrass habitats. Currently identified injuries include thousands of oiled birds, nearly 100 miles
19 of oiled shoreline and habitat, and substantial lost human use days at beaches, parks, and other
20 recreation areas in the vicinity of the spill. Data collection, however, is still ongoing and the
21 scope and extent of the injuries may increase. The United States intends that the ongoing NRDA
22 process be sufficiently complete to allow the phased approach to litigation to result in efficient
23 litigation and preserve the court's and the parties' resources.

24 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

25 Defendants M/V COSCO BUSAN, Regal Stone Ltd. and Fleet Management Ltd. contend
26 that the United States' claims, should be dismissed in their entirety and that the United States
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1 should submit its claims for damages arising from the oil spill alleged in its Complaint to the
2 designated Responsible Party as required by applicable law.

3 **Defendant John Cota's Position:**

4 Defendant Cota joins in Co-Defendants' contention that the United States' claims should
5 be dismissed in their entirety.

6 **Defendant SIGCO's Position:**

7 Defendant SIGCO contends that the United States' claims against it should be dismissed
8 with prejudice in their entirety.

9 **XII. SETTLEMENT AND ADR**

10 The parties have not participated in ADR.

11 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

12 The United States does not consent to utilizing a magistrate judge.

13 **XIV. OTHER REFERENCES**

14 The United States does not consent to utilizing binding arbitration, a special master, or
15 the Judicial Panel of MultiDistrict Litigation.

16 **XV. NARROWING OF ISSUES**

17 **United States' Position:**

18 The United States' intent is that the phased described in its proposed Case Management
19 Plan approach will narrow the issues.

20 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

21 Defendants M/V COSCO BUSAN, Regal Stone Ltd. and Fleet Management Ltd. contend
22 that the United States' claims, in their entirety, can be resolved without litigation if the United
23 States will comply with applicable law and submit their claims to the designated Responsible
24 Party for review and payment.

25 **Defendant John Cota's Position:**

26 Defendant Cota joins in Co-Defendants' contention that the United States' claims, in their
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entirety, can and should be resolved without litigation if the United States will comply with applicable law and submit their claims to the designated Responsible Part for review and payment.

XVI. EXPEDITED SCHEDULE

Not applicable.

XVII. SCHEDULING

See above.

XVIII. TRIAL

United States' Position:

The expected length of the Phase I trial is ten days. The expected length of the Phase III trial is 21 days. The parties have not reached agreement on whether the case could and/or would be tried to a jury or to the Court.

Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:

Defendants contend that there should be no trial and that the United States' claims should be dismissed in their entirety.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

United States' Position:

The United States is not required to file a Certification of Interested Entities or Person, but states that it is unaware of any specific persons, firms, partnerships, corporations (including parent corporations) or other entities other than the parties to have either: (I) a financial interest in the subject matter in controversy or in a party to the proceedings; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:

Defendants will file a Certification of Interested Entities prior to the Case Management Conference.

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1 **XX. CONCLUSION**

2 **United States' Position:**

3 The United States proposes that the Court adopt the United States proposed Case
4 Management Plan.

5 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

6 Defendants' position is that the United States' claims should be dismissed in their
7 entirety.

8 **Defendant John Cota's Position:**

9 Defendant Cota's position is that the United States' claims should be dismissed in their
10 entirety or, at the very least, stayed pending exhaustion of the administrative claims process and
11 resolution of the criminal proceedings contemplated by the Department of Justice targeting
12 defendant Cota.

13 Defendant Cota further urges this Court to continue the Case Management Conference
14 until resolution of the anticipated Motions to Dismiss or, in the alternative, Stay this action.

15 **Defendant SIGCO's Position:**

16 Defendant SIGCO's position is that the Complaint should be dismissed with prejudice in
17 its entirety against SIGCO.

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UNITED STATES [PROPOSED] ORDER

The Court, having reviewed the foregoing Proposed Case Management Plan hereby
ORDERS that the schedules and agreements as proposed by the United States as set forth therein
are entered as the Case Management Order for this action.


IT IS SO ORDERED.

DATED: _____

UNITED STATES DISTRICT JUDGE

1 Dated: Dated: February 15, 2008.

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

2
3 
4 R. MICHAEL UNDERHILL
5 Attorney in Charge, West Coast Office
6 GEOFFREY D. OWEN
7 Trial Attorney
8 Torts Branch, Civil Division
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10 /s/ Bradley R. O'Brien
11 BRADLEY R. O'BRIEN
12 Senior Attorney
13 Environmental Enforcement Section
14 United States Department of Justice

Attorneys for Plaintiff
United States of America

14 Dated: Dated: February 15, 2008.

KEESAL, YOUNG & LOGAN

15 /s/ John Giffin
16 By: JOHN GIFFIN

17 Attorneys for Defendants M/V COSCO BUSAN,
18 Regal Stone Limited, the latter presently appearing
19 solely pursuant to Supplemental Admiralty Rule
20 E(8) of the Fed.R.Civ.P. as claimant to COSCO
21 BUSAN, and Fleet Management Ltd.

21 Dated: Dated: February 15, 2008.

COPPENRATH & ASSOCIATES

22 /s/ Walter G. Coppenrath, Jr.
23 By: WALTER G. COPPENRATH, JR.

COPPENRATH & ASSOCIATES

24 Attorneys for John Cota

25 //
26 //
27 //
28 //

1 Dated: Dated: February 15, 2008.

McGUIRE WOODS

2 /s/ Sidney Kanazawa

3 By: SIDNEY KANAZAWA

4 Attorneys for Shipowners' Insurance & Guaranty
5 Company Ltd.